No. 94-957

IN THE

Supreme Court of the United States

October Term, 1994

AMERICAN DISPOSAL, CO., D.M. DISPOSAL CO.,
and MURREY'S DISPOSAL CO.,

Petitioners,

v.

RANDY HUME, CHRIS DAVIES, MICHAEL ROGGE and ROBERT TAYLOR

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a state court action for retaliation in violation of state public policy protecting employees from discharge or harassment for claiming overtime or participating in a state investigation of overtime claims preempted by the Garmon doctrine under the National Labor Relations Act?

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The Respondents, Randy Hume, Chris Davies, Michael Rogge and Robert Taylor, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Washington Supreme Court's decision in this case.

OPINIONS BELOW

The trial court's denial of summary judgment on preemption grounds, and the trial court's denial of a motion to dismiss on preemption grounds, are not published and are reprinted in Respondents'[1] Appendix A and B,

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1. References to the Petition are designated "Pet." with the appropriate page indicated. Petitioner's Appendix is referenced as "Pet. App."; Respondents' Appendix is referenced as "Resp. App." References to the trial court and Washington Supreme Court's rulings are made by reference to the Appendix where those decisions can be found. References to the trial exhibits are designated "Ex." and to the trial transcript are designated by "Tr." with the appropriate number or page citation, respectively. The only portion of the trial transcript appended herein is that portion transcribing the trial court's denial of Petitioners' request for summary judgment on a Garmon preemption theory. See Resp. App. B.

respectively. The excerpt of the jury's verdict pertaining to the public policy tort is reprinted in Respondents' Appendix C.

The opinion of the Washington Supreme Court is reported at 124 Wn. 2d 656 (1994) and is reprinted in Petitioners' Appendix A. The Washington Supreme Court's order on reconsideration on the issue of attorney's fees has not yet been published and is reprinted in Respondents' Appendix D.

STATEMENT OF THE CASE[2]

Respondent employees did not contend, as Petitioners suggest, that they suffered retaliation because they

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2. The Petitioners' Statement Of The Case contains several misstatements of fact which have a bearing on the question of what issue would be before the Court if certiorari were granted. Therefore, Respondents present this restatement of the facts. See Sup. Ct. R. Rule 15.1. In the following discussion of why the petition should be denied, the Respondents also call the Court's attention to other misstatements of fact.

"fil[ed] grievances with their union regarding overtime." (Pet. at 4). They based their state claims of retaliatory harassment and discharge in violation of Washington State public policy on allegations that they suffered retaliation because of direct overtime complaints and request to their employers, made in the context of a State investigation of overtime violations by their employers.

The Jury found that three of the four "Plaintiffs were constructively discharged in retaliation for requests for overtime wages, complaints about the employers' failure to pay overtime wages or participation in the Department of Labor and Industries investigation of overtime claims." (Resp. App. C). The Jury similarly found the "Defendants wrongfully harassed [the four] Plaintiffs

in retaliation for requests for overtime wages, complaints about the employers' failure to pay overtime wages or participation in the Department of Labor and Industries investigation of overtime claims." (Resp. App. C).

Moreover, Petitioner's statement that "none of the Plaintiffs . . . participat[ed] in any [Department] investigations" (Pet. at 6) is a misstatement of fact and law contrary to the jury's verdict and to the conclusion of the Washington Supreme Court in its decision on appeal.

The Washington Supreme Court recited both the nature of the Respondents' claims and the context in which those claims arose in its opinion on appeal:

> The crux of the employees' claims is that the defendants retaliated against them for demanding overtime pay. . . . In August, 1988, after learning that they were entitled under

state law to be compensated, each of the plaintiffs began to record and turn in overtime. Meanwhile, in July the State Department of Labor and Industries had begun investigating complaints of unpaid overtime claimed by route drivers not plaintiffs in this case. The investigation was concluded in September when it was discovered that several of the defendants' employees were owed overtime compensation. The defendants settled these claims, changed their overtime policy, and installed a time clock for the drivers. At the same time, however, they instituted a stricter morning schedule and a rule forbidding the drivers to talk to each other on company property.

Although the overtime claims by the drivers in this case were not the direct focus of the state investigation, the result of the investigation had an impact on them, as the relationship between the defendants and their employees continued to deteriorate. At trial, the plaintiffs presented evidence that when they submitted overtime requests, they along with other drivers, began to suffer verbal abuse and threats. . . . The harassment continued until the plaintiffs eventually left

their employment in 1989. (Pet. App. at A-16 - A-18).

As can be seen from the foregoing, the Petitioners' suggestion that the settlement that occurred in September, 1988, was of outstanding union grievances, is similarly a distortion of the facts. (Pet. at 5). The settlement addressed the Respondents' direct requests to their employers for overtime compensation. Those requests occurred in the context of a Department of Labor and Industries investigation and settlement of a claim filed with the State by a former employee of Petitioners, Lawrence Schwerzler, for overtime.

The investigation began in May, 1988. In June, Ms. Roberta Soran, the Department's representative, informed the employers that their failure to maintain records of actual time worked violated state law and that "[i]nformation [the

Department] received indicates that the alleged deficiency of inappropriate payment of overtime hours is more broadcast than this individual claim would indicate" and that "it was a situation that involved more than one worker." (Tr. 479-481, Ex. 83).[3]

Ms. Soran attempted to obtain the names of the employees from all three respondent employers, "because . . . it was [her] intent to interview those other workmen . . . ." (Tr. 479). She intended that "[a]s data are gathered from other workmen, we [would] make a determination about our continuing involvement in their behalf . . . to take whatever action

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3. Ms. Soran "as a matter of courtesy" let Teamsters Local 313, the collective bargaining representative of the employees, know that she was investigating potential violations of state overtime law. (Tr. 474-475). The Washington Supreme Court's factual recitation reflected this testimony by stating that "after learning that they were entitled under state law to be compensated, each of the plaintiffs began to record and turn in overtime." (Pet. App. A-16).

[was] necessary to get them those wages." (Tr. 498). However, the employers gave her the names of only four employees of one of the companies, despite her desire to obtain the names of employees from all three companies. (Tr. 497; Tr. 499). She sent each of the named employees a survey concerning the employers' overtime practices, but was unable to send surveys to other employees because the employers had not identified them. (Tr. 484-485).

In order to bring about an end to the widening investigation, the employers agreed to pay the overtime owing to Schwerzler, instituted a time-clock on September 4, 1988, and assured the State that all outstanding claims for overtime would be paid. (Tr. 109; Tr. 427; Tr. 482: 19-21; Tr. 501: 10-13; Ex. 64; Tr. 521-522).

Schwerzler had also filed a grievance concerning his overtime, which he settled simultaneously with the State complaint. (Ex. 95; Ex. 96; Ex. 185). During the Schwerzler settlement discussions, the employers reported to the Department that they were "working with" the Union regarding payment of the other employees' overtime requests. (Ex. 96). The Department confirmed that payment occurred before closing its investigation. (Tr. 525).

Petitioners' statement of the issue emphasizes grievance filing by the Respondents and the Petition characterizes the September settlement as resolution of Union grievances. (Pet. at 6). However, only two of the Respondents filed overtime grievances and they did so literally on the eve of the settlement with the State. Davies and Hume, who

previously had been turning in direct requests for overtime, each filed one overtime grievance on September 14, 1988, - one day before the settlement was reached. (Tr. 1163: 5-12; Tr. 98-99).[4] Irrespective of these two grievances, the compensation paid was for overtime recorded by each employee and turned in directly to the employer by Randy Hume, Chris Davies, Michael Rogge[5] and several other drivers and came as a direct result of the Department's investigation.

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4. The Petition's characterization of the overtime requests made in August as "grievances" is not supported by the testimony appended, in which Don Hawkins, the companies' Vice-President states that he received several "overtime requests" towards the end of August. (Pet. at 6; Pet. App. B-19).

5. (Pet. App. B-3, B-4, B-19, B-20; Tr. 1151; 1152:3-11; 1154:11-1155:9; 1162:22-24; Tr. 588; Tr. 479; Tr. 498). Although the record is unclear as to whether Respondent Taylor received overtime compensation as part of this settlement, the parties stipulated at trial that Taylor made overtime requests in July and August of 1988 and that he received payment for overtime in September and October, 1988. (Tr. 1397).

Finally, Petitioners' contention that continued "verbal abuse, threats, unwarranted warning letters, and . . . [retaliatory] route enlarge[ments]" were due to a "grievance" settlement is yet another mischaracterization of the facts. (Pet. at 6). In this regard, the Petition's factual contention is directly contrary to the opinion of the Washington Supreme Court, which specifically noted that it was the Department's investigation which caused the following "impact:" "[W]hen [the Respondents] submitted overtime requests, they, along with other drivers, began to suffer verbal abuse and threats. They also began to receive unwarranted warning letters, some threatening termination if they did not complete their routes within the scheduled 40 hours. . . . [T]heir

routes were actually enlarged after they complained." (Pet. App. A-17 - A-18).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS IS NOT, AS THE PETITION SUGGESTS, A CASE IN WHICH EMPLOYEES SEEK STATE PROTECTION FOR UNION ACTIVITIES; RATHER, HERE THE EMPLOYEES SOUGHT TO VINDICATE THEIR RIGHTS TO MAKE CLAIMS UNDER A STATE STATUTE OF GENERAL APPLICATION.

The claim for relief as described in the complaint, in the jury instructions and in the jury verdict form was for a remedy for violation of RCW 49.46.100(2) which protects employees from retaliation when they act to enforce the State public policy that requires overtime compensation for hours worked in excess of 40 per week. Thus, this case does not present, as the Petition suggests, an issue of State jurisdiction to enforce a State statute designed to protect Union activity. Compare e.g., McGlone v. Cintas Corp., 35 F.3d 566 (6th Cir.

1994), Washington Service Contractors Coalition v. District of Columbia, 858 F. Supp. 1219 (D. D.C. 1994).

Moreover, the evidence presented in support of the claim, and on which the jury found liability, was that described above, i.e., individual claims for overtime compensation in the context of a Department investigation. Thus, Respondent's did not "claim[] in their lawsuit that they were retaliated against because they complained . . . to their Union about overtime pay [including] filing grievances . . ., discuss[ed] overtime with fellow employees, and attend[ed] union meetings . . .." (Pet.

at 6).[6]

Petitioners attempt to characterize the Respondents' individual overtime claims as Union instigated activity orchestrated at Union meetings in August, 1988, must also fail because it asks this Court to find facts not found by the jury, and in a manner inconsistent with the record.

The evidence clearly established that Respondents' complaints about

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6. Similarly, the Petitioners misstated the nature of Hume's and Rogge's allegations: "Two of the Plaintiffs also contended at the trial that their union positions contributed to the Defendants' retaliation against them." (Pet. at 6-7). The testimony cited by Petitioners is each employee's response to leading cross-examination questions suggesting that the retaliation they suffered was at least partly because of their roles in the Union. Both men simply testified that they could not exclude that possibility. However, Hume noted that the retaliation against him began as soon as he turned in overtime and **before** he assumed his role as a shop steward. (Pet. App. B at B-1 and B-2; B-13 -- B-16; Tr. 1270). Again, there is no such allegation in the pleadings, no jury instruction allowing the jury to consider retaliation against roles assumed in the Union, and no jury finding that Hume or Rogge, or any other Respondent for that matter, suffered retaliation because of their Union roles.

overtime and the resulting retaliation began well before the Union meetings. Davies first complained about overtime in August of 1987 and received his first retaliatory warning letter in December of 1987. (Tr. 67-70). Taylor began making overtime requests in July, 1988. (Tr. 1397). At the end of July, 1988, Hume informed his employer that he would be henceforth turning in his overtime and expecting payment for it. (Tr. 1255-1256). He continued to claim overtime into August. In August, 1988, Rogge turned in overtime on a piece of paper he left on the desk of the companies' Vice-President. (Tr. 557-558). The employers instituted the retaliatory change in starting times on August 16, 1988, after the individual requests for overtime had been made, but before the second Union meeting occurred. (Tr. 1157). Davies

again turned in overtime requests in August, 1988, and was verbally attacked by the owner of the company on August 22, 1988. (Tr. 79-81).

The Union meetings occurred in mid-August and on August 31, five months after the Department had notified the Union that it was investigating overtime violations by the employers. (Tr. 473-475). The subjects of the meetings were the length of the routes, the work pace, the institution of the time-clock as a result of the State's investigation and the new work rules, including the retaliatory change in start times and no-talking rule mentioned in the Washington Court's opinion. (Tr. 90; Tr. 1165).

At most, the Union was on a parallel track with the Department. The Union had been informed by the Department of potential overtime violations. (Tr. 474-

475) It encouraged the drivers to work at a brisk, but reasonable pace. It advised them that they had state law rights to be paid their overtime and informed the workers that the Department was investigating the employers' failure to pay overtime. Thus, Petitioners' statement that the overtime requests made in August were orchestrated by the Union is a distortion of the facts. (Pet. at 5-6). The Union simply advised the employees how to document the statutory overtime requests they were already making to their employers.

II. THE DECISION OF THE WASHINGTON SUPREME COURT IS COMPLETELY CONSISTENT WITH PRECEDENT ESTABLISHED BY THIS COURT.

The Washington Supreme Court carefully followed this Court's precedent in holding that "the employer retaliation regulated by the statute in this case touches a deeply rooted local concern,

and, therefore falls under an exception to the Garmon doctrine." (Pet. App. 1-24). This holding is completely consistent with this Court's reasoning in Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 194-195 (1978), and in Farmer v. Carpenters, 430 U.S. 290 (1977). In Sears, 436 U.S. at 196-197, this Court explained the analysis developed in Farmer:

> The Court identified those factors which warranted a departure from the general pre-emption guidelines in the "local interest" cases. Two are relevant to the arguably prohibited branch of the Garmon doctrine. . . . First, there existed a significant state interest in protecting the citizen from the challenged conduct. Second, although the challenged conduct occurred in the course of a labor dispute and an unfair practice charge could have been filed, the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable

> federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same.

(Footnotes omitted, emphasis added.)

Following this analysis, the Washington Court first held that the state statute did not regulate activity protected under the NLRA. Next, it reasoned that "[if] anything, the statute regulates employer activity prohibited by the NLRA, and thus is less likely to interfere with the federal scheme and require preemption . . . ." (Pet. App. 25-26). Continuing to apply this Court's reasoning in Sears, the Washington Court held that the Respondents' "claims are based upon a statute which reflects a legitimate local concern rooted in a strong and clearly articulated public policy." (Pet. App. A-26). Finally, the Court carefully examined the nature of

both the federal and state claims and determined that the "controversy presented to the state court is different from that which could have been, but was not, presented to the Labor Board" because the Board's inquiry would focus on whether the Respondent's activities were "protected 'concerted activity'," while state inquiry would concern whether the employers retaliated because the subject of each employee's complaint was overtime. (Pet. App. A-25).

Thus, Petitioners' contention that the Washington Supreme Court's decision ignored the Sears analysis and is inconsistent with Local 100, United Associations of Journeymen v. Borden, 373 U.S. 690 (1963) and Motor Coach Employee v. Lockridge, 403 U.S. 274 (1971) because the Court "only looked to labels or legal standards," is plainly inaccurate.

Moreover, Petitioners' assertion that, under the NLRA, the inquiry of whether charging parties have engaged in protected concerted activity is merely a "jurisdictional" label is astounding and without citation. (Pet. at 15). Section 7 of the NLRA provides substantive protection for employees engaged in concerted activity and Section 8 of the Act provides substantive protection against interference with Section 7 rights. See 29 U.S.C. § 151. However, the substantive protection is for "concerted" activity, not for any particular working condition. Conversely, the state jury's inquiry here did not concern itself with whether activity was "concerted," but only with whether the acts in question were assertions of rights to a particular

working condition, i.e., overtime compensation.

III. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THE CIRCUIT COURTS.

Petitioners' contention that the decision below presents a conflict with holdings of several U.S. Circuit Courts is premised primarily on two decisions, Platt v. Jack Cooper Transport Co., 959 F.2d 91 (8th Cir. 1992) and Bassette v. Stone Container Corp., 25 F.3d 757 (9th Cir. 1994). The Ninth Circuit's ruling in Bassette pertains to a completely different situation than that presented in this case. Moreover, in more analogous cases, the Ninth Circuit has ruled in a manner consistent with the Washington Supreme Court's decision here. Nor does the holding in Platt, which the Eighth Circuit limited to the facts of that particular case, constitute a true

split sufficient to cause this Court to exercise its supervision.

In Bassette, the plaintiff was terminated during a collective bargaining contract hiatus period for alleged falsification of test results. She filed an action in a Montana State court alleging a breach of the Montana's statute requiring employers to show just cause to terminate an employee's employment. Mont. Code Ann. § 39-2-904(2) (1987).

Prior to the termination, the employer had unilaterally implemented terms and conditions of employment following a declared impasse in contract negotiations. Thus, there was no collective bargaining agreement in effect between the parties.

The Ninth Circuit noted that during hiatus periods, employers' obligations

vis a vis established working conditions arise strictly from operation of the Act, not from the defunct collective bargaining agreement: "besides limiting employers in which terms they may implement after impasse, section 8 requires that employers honor those terms once they are implemented . . .." Bassette, 25 F. 3d at 761.

Thus, the Ninth Circuit concluded that:

> Bassette's claim alleges conduct on the part of Stone - discharge without good cause - that would constitute a failure to honor a term of employment implemented by Stone after negotiations with the Union reached impasse. Cuyamaca Meats establishes that such conduct would violate an employer's duties under section 8 of the NLRA. Because Bassette has alleged conduct that constitutes a violation of section 8, her claim is at least arguably subject to the jurisdiction of the NLRB. As such, her claim is preempted by the NLRA under the Garmon doctrine.

Bassette, 25 F. 3d at 761.

Unlike the instant case, Bassette essentially concerned an allegation that the employer had violated Section 8(a)(5) of the NLRA which requires employers to bargain in good faith. Hence, the Court's decision in Bassette conforms to the many decisions, not applicable here, holding that state claims which amount to bad faith bargaining charges are preempted because they have a high potential to interfere with the federal scheme. See e.g., Local 1054 v. W.C. Industrial Relations Association, 775 F. 2d 1042 (9th Cir. 1985) (§8(a)(5) interference with contract claim) (cited in Pet. at 20); Parker v. Connors Steel Co., 885 F. 2d 1510 (11th Cir. 1988) *cert. denied*, 490 U.S. 1066 (1989) and Serrano v. Jones & Laughlin Steel Co., 790 F. 2d 1279 (6th Cir. 1986), *cert. denied*, 488

U.S. 1000 (1989) (both §8(a)(5) - fraud claims cases) (cited in Pet. at 20 and 21, respectively.)

In cases where the Ninth Circuit has considered issues analogous to that here, it has found no preemption of the state's jurisdiction. For example, in Paige v. Henry J. Kaiser Co., 826 F.2d 857, 862, (9th Cir.), cert. denied 486 U.S. 1054 (1988), the Court refused to hold that a claim for wrongful termination in violation of California's public policy preempted under Garmon or under Section 301 of the LMRA. Cf. Price v. PSA Air, Inc., 829 F.2d 871, 876 (9th Cir.) *cert. denied*, 486 U.S. 1006 (1987) (RLA does not preempt state wrongful discharge claim even though premised on employees' activities in a union context).

Petitioner's reliance on the Eighth Circuit's holding in Platt, is likewise

misplaced. Although the ruling in Platt appears to be in conflict with the decision here, careful reading of the Platt decision reveals that the Court clearly restricted its holding to the peculiar facts of that case. Moreover, the Court announced explicitly that it did not intend that its holding necessarily should be followed in other cases.

In that unusual case, the court held that "on the facts of this case, . . . Platt's state law claims are preempted by the NLRA as construed in Garmon," emphasizing that:

> it is highly relevant that Platt unsuccessfully sought relief through the grievance process and directly from the NLRB before commencing this lawsuit. The risk of interference with the Board's jurisdiction is ... obvious and substantial when an unsuccessful charge to the Board is recast as a state law

claim. Platt, 959 F.2d at 95 (footnote omitted).

Even more significantly, the Eighth Circuit expressly limited the vitality of its Platt decision as precedent in other cases, by stating that, "We do not reach the question whether employee suits seeking redress for violation of state whistle-blowing statutes are generally preempted under Garmon because we believe the "local interest" exception to Garmon preemption requires a more fact-sensitive approach." Platt, 959 F.2d at 95 (emphasis added).

Thus, the Platt decision does not create a true conflict requiring this Court's resolution. Moreover, the decision below is consistent with the Ninth Circuit precedent cited above. Finally, it is also consistent with the Fifth Circuit's decision in Windfield v. Groen Div., Dover Corp., 890 F.2d 765,

770 (1989) (state claims of union activist fired during an organization campaign not Garmon preempted); Haynes v. Zoological Soc. of Cincinnati, 9 IER 124, 128-129 (Ohio Ct. of Appeals, 1st App. Dist. 1993).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for certiorari.

DATED this 20th day of December 1994.

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APPENDIX "A"

HONORABLE BRIAN TOLLEFSON

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

RANDY HUME, CHRIS DAVIES, MICHAEL ROGGE, and ROBERT TAYLOR,	)
Plaintiffs,	)
v.	)
AMERICAN DISPOSAL CO., a corporation; D.M. DISPOSAL CO., a corporation; and MURREY'S DISPOSAL CO., a corporation,	)
Defendants.	)

NO. 90-2-00344-8

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER having come on regularly for hearing before this Court on the motion of Defendants for an order

granting their Motion for Partial Summary Judgment dismissing Plaintiffs' Second, Third and Fourth Causes of Action; the Plaintiffs having appeared by and through their counsel of record, Lawrence Schwerin and Kathleen Phair Barnard of Hafer, Price, Rinehart & Schwerin, and the Defendants having appeared by and through their counsel of record, Lewis L. Ellsworth of Davis, Grimm & Payne; the Court having reviewed the written and oral arguments of counsel, the following affidavits and declarations: Declaration of Lewis L. Ellsworth, Declaration of Don Hawkins, Affidavit of Roberta Soran, Affidavit of Michael Brandow, Affidavit of Inez Levin, Declaration of Harold Dean Stroud, Declaration of Larry Schwerzler, Declaration of Cary Bertram, and Affidavit of Kathleen Phair Barnard and

having reviewed the records and files herein; it is hereby

ORDERED that Defendants' Motion for Partial Summary Judgment on Plaintiffs Second, Third and Fourth Causes of Action is DENIED.

DONE IN OPEN COURT this 22nd day of November, 1991.

/s/

HONORABLE BRIAN TOLLEFSON
JUDGE

Presented By:

/s/

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Attorneys for Defendants

APPENDIX "B"

[Excerpt of Transcript Page 1499]

The area of protection is not in the state through Department of Labor & Industries, it's through the National Labor Relations Board. Those causes of action are preempted.

Thank you.

THE COURT: I'm concerned about the form of the motion. I prefer to treat Mr. Grimm's motions as motions to dismiss.

With respect to the handicap claim, motion to dismiss is granted based on lack of expert medical testimony and lack of notice to employer.

All the other motions are denied.

APPENDIX "C"

HONORABLE BRIAN TOLLEFSON

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

RANDY HUME, CHRIS DAVIES, MICHAEL ROGGE and ROBERT TAYLOR,	)
Plaintiffs,	)
v.	)
AMERICAN DISPOSAL CO., a corporation; D.M. DISPOSAL CO., a corporation; and MURREY'S DISPOSAL CO., a corporation,	)
Defendants.	)

NO. 90-2-00344-8

JURY VERDICT FORM

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Do you find that any of the Plaintiffs were constructively discharged in retaliation for requests for overtime wages, complaints about the employers' failure to pay overtime wages or participation in the Department of Labor and Industries investigation of overtime claims?

Answer "yes" or "no" after the name of each Plaintiff.

Answer:	Yes	No
Randy Hume	X	___
Chris Davies	X	___
Michael Rogge	___	X
Robert Taylor	X	___

Regardless of your answer, proceed to the next question.

QUESTION NO. 2: Do you find that Defendants wrongfully harassed any of the Plaintiffs in retaliation for requests for overtime wages, complaints about the employers' failure to pay overtime wages or participation in the Department of Labor and Industries investigation of overtime claims?

Answer "yes" or "no" after the name of each Plaintiff.

Answer:	Yes	No
Randy Hume	X	___
Chris Davies	X	___
Michael Rogge	X	___
Robert Taylor	X	___

DATED this 25th Day of February, 1992.

/s/

Presiding Juror

APPENDIX "D"

IN THE SUPREME COURT OF WASHINGTON

RANDY HUME, ET AL,	)
	)
Respondents,	)
	)
v.	)
	)
AMERICAN DISPOSAL COMPANY, ET AL,	)
	)
Appellants.	)

NO. 60808-3

ORDER GRANTING RESPONDENTS' MOTION FOR RECONSIDERATION WITHOUT NEW ARGUMENT AND ORDER CHANGING OPINION

It is hereby ordered that the opinion in the above cause, as the same appears at 124 Wn. 2d 656, be changed as follows:

On the 15th line from the bottom of page 673, following the word

"recalculation", insert "of trial and appellate attorney fees".

It is ordered that further reconsideration is denied.

Dated this 27th day of October, 1994.

/s/

Chief Justice

APPROVED:

/s/